FILED

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

IN RE: PETITION OF
KNOX COUNTY PUBLIC DEFENDER

2009 NOV 25 AM 10: 29
HOWARD G. HOGAN
Docket No. 174552-2

KNOX COUNTY PUBLIC DEFENDER'S MEMORANDUM OF LAW REGARDING JURISDICTIONAL AND *EN BANC* ISSUES

The Knox County Public Defender, through counsel, submits this Memorandum of Law on two issues, as requested by the Court. At the October 29, 2009, hearing, the Court asked that the parties provide briefs on two issues:

1. Were the proceedings in the General Sessions Court lawful proceedings and therefore subject to review upon Writ of Certiorari?

2. Were the General Sessions Court judges authorized to sit *en banc* at the June 10, 2008, hearing and to issue an Order signed by all five judges?

(Transcript, Oct. 29, 2009, hearing, at pp. 66–69 (full transcript attached as **Exhibit A**)).

The proceedings in the General Sessions Court were lawful because the Supreme Court of Tennessee has considered and approved the procedure employed in this case.

The proceedings before the General Sessions Court February 25, 2009 were a lawful and appropriate exercise of the inherent power of the General Sessions Court judges to regulate practice in their courts. Because the proceedings below were lawful, they are subject to review by this Court on a Petition for Writ of Certiorari. The Supreme Court of Tennessee explicitly approved these kinds of proceedings in *Taylor v. Waddey*, 334 S.W.2d 733 (Tenn.1960) (copy attached as **Exhibit B**).

In conducting the evidentiary hearing below, the General Session Court did not necessarily believe that it was sitting *en banc*. Rather the Judges of that Court decided to hear the Public Defender's evidence in support of his petition at a single hearing rather than five separate

hearings. (Transcript, June 10, 2008, hearing, at pp. 5–7, which pages are attached at **Exhibit C**). Even if the judges of the General Sessions Court were sitting *en banc*, however, the Supreme Court of Tennessee held in *Taylor*, in a similar situation, that the General Sessions Judges of Davidson County could properly sit and rule *en banc* in a matter involving practice in their Courts.

The State complains that the hearing before the General Sessions Judges was "one-sided." (Transcript, October 29, 2009 hearing, at p. 33). Yet the General Sessions Judges invited the State to participate fully in the June 10, 2008 hearing. In fact, Judge Geoffrey P. Emery asked the State whether it intended to call witnesses. (Transcript, June 10, 2008, hearing, at p. 7). Although invited to participate fully, the State declined to cross-examine witnesses or even to call a single witness on its behalf and instead relied solely on legal argument. (*Id.*).

Rule 13 imbues the General Sessions Court with the power and discretion to appoint counsel in criminal cases and to determine whom shall be appointed.

The General Sessions Court has both the power and the discretion, granted by Rule 13 of the Rules of the Supreme Court of the State of Tennessee (hereinafter "Rule 13") to (1) appoint counsel for indigent criminal defendants and (2) decide whom shall be appointed. Sup. Ct. R. 13, § 1(c), (e)(4).

Therefore, the General Sessions Court had jurisdiction and, thus, power to consider the request of Public Defender's Office for relief from its excessive caseload, a request which was made by way of a sworn petition. Because it had jurisdiction to consider the request of the Public Defender's Office, the General Sessions Court also had the power to enter an Order on the request for relief. The source of the General Sessions Court's jurisdiction to take these actions is, of course, Rule 13, through which the Supreme Court has granted the General Sessions Court

power to determine whether, in its judgment, appointment of the Public Defender's Office is allowable, based upon specific criteria set out in the rule.

In *Taylor v. Waddey* the Supreme Court explicitly sanctioned proceedings similar to those that took place in the General Sessions Court here. The *Taylor* court also approved of seeking review of those proceedings by Writ of Certiorari.

In *Taylor v. Waddey*, 334 S.W.2d 733 (Tenn.1960), the Supreme Court of Tennessee considered and approved of proceedings very similar to those that occurred in the General Sessions Court in this case. The *Taylor* court's holding remains good law almost 50 years later and establishes that the proceedings in the Knox County General Sessions Court in this case were lawful and subject to review by a superior court.

The *Taylor* case involved an effort by the five General Sessions Court judges of Davidson County to regulate the practice of a bonding company in each of the General Sessions Courts. The Supreme Court of Tennessee held that the activity at issue—a particular bonding company's appearance before the Davidson County General Sessions Court—involved "an integral part of the operation of the judicial system," id. at 735, and was an appropriate exercise of "the inherent right of the court to properly administer its affairs," *id.* at 736. In this case, it was likewise appropriate for the judges of the Knox County General Sessions Court to determine how to apply Rule 13 in their court.

Notably, the proceedings in *Taylor* were not commenced by way of a civil or criminal warrant or criminal or civil citation. Rather, a judge of the Davidson County General Sessions Court had notice served on the bonding company at issue to appear and show cause why it should not be suspended from writing bonds in the General Sessions Court. *Taylor*, 334 S.W.2d at 734. Thus, there was no "case" in *Taylor*; there were no adversarial parties (i.e., prosecutor and criminal defendant or plaintiff and civil defendant). Despite the apparent absence of a

"case," the Supreme Court of Tennessee held that the show-cause proceedings were lawful and subject to review by way of a Writ of Certiorari. *Id.* at 735, 737–38. Similarly, although the State was invited to participate fully, if there was a lack of adversarial parties before the General Sessions Court in this matter, this in no way renders the proceedings that took place in that court unlawful. Rather, under *Taylor*, those proceedings were lawful.

The Supreme Court said in *Taylor* that it was altogether fitting and proper for the five General Sessions Judges of Davidson County to sit together and to decide, based upon evidence presented to them, that a particular bonding company should be permanently suspended from writing bonds in each of the five General Sessions Courts. *Id.* at 737–38. The Supreme Court recognized the "inherent powers and rights to see that the courts over which they preside are conducted in an honorable and upright manner by those who are officers of the court or who are dealing with the court." *Id.* at 736. The Supreme Court stated that, so long as exercise of these inherent powers and rights "are not capricious, arbitrary, or solely without basis of right," they are proper, and will be upheld. *Id.* Further, the Supreme Court held that a Writ of Certiorari was the proper means for challenging the decision of the General Sessions Judges. *Id.* at 735.

Certainly, the inherent powers and rights of the General Sessions Court, as described by the *Taylor* court, extend to ensuring that indigent criminal defendants are represented in accordance with constitutional and professional standards.

The *Taylor* opinion provides clear precedent and support for 1) the commencement of proceedings in the General Sessions Court by the Public Defender's initial sworn petition 2) the entry of an Order on the sworn petition by the judges of that Court applying Rule 13, and 3) review of that Order by Writ of Certiorari.

Rule 13 is an appropriate exercise of the Supreme Court's general oversight of the judicial system of Tennessee.

Rule 13 was promulgated by the Supreme Court under its "inherent supervisory power to regulate the practice of law" in this state. *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d 465, 469 (Tenn. 2003); *Brown v. Bd. of Prof'l Responsibility*, 29 S.W.3d 445, 449 (Tenn. 2000); *In re Petition of Burson*, 909 S.W.2d 768, 773–74 (Tenn. 1995); *see Belmont v. Bd. of Law Examiners*, 511 S.W.2d 461, 463–64 (Tenn. 1974).

Rule 13 explicitly applies to General Sessions Court:

> (c) All general sessions... courts shall appoint counsel to represent indigent defendants... according to the procedures and standards of this rule. Rule 13, Section 1 (c)

The Supreme Court has recognized that a direct petition, such as the one filed in this case, is the appropriate method of asking a court to "reconsider" the "application" of rules as applied in that court. *See Allen v. McWilliams*, 715 S.W.2d 28, 30 (Tenn. 1986).

In *McWilliams*, the Court was asked to modify its procedures for compensating attorneys appointed in misdemeanor cases—the petitioners asked that the Court modify or revise a rule it had promulgated. *Id.* at 29–30. The *McWilliams* opinion supports the proposition that, if an attorney has asked the General Sessions Court for relief that requires application of a rule of the Tennessee Supreme Court, and the attorney is dissatisfied with that court's order, that attorney may seek review of that order in a superior court.[1] *Id.* at 32.

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[1] As the *McWilliams* court stated:

> Where a claimant is dissatisfied with the order of a municipal or general sessions judge, it is necessary that we prescribe a procedure for review of orders of those local courts. Accordingly we direct that a claimant, if dissatisfied, may appeal to the circuit or criminal court of the county in which the services were rendered in accordance with existing provisions for appeals in such cases.

In both the *McWilliams* case and the case at hand, the petition was filed with the court responsible for making the decision at issue: in *McWilliams*, the issue was *modification* of the Supreme Court rule governing compensation for appointed counsel; here, the issue is the *application* of a Supreme Court rule—a rule that specifically gives the General Sessions Court the authority to make the appointment decision in the first instance—to the ability of the Public Defender to accept additional appointments.

Rule 13 specifically charges the General Sessions Court with making the decision whether to appoint when faced with evidence that "adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." Rule 13, Section 1 (e)(4)(D)

The Public Defender followed the procedure approved by the Supreme Court in *McWilliams*. He asked the Court that makes the appointment decision under Rule 13 to reconsider and modify its decision. The Supreme Court's language in *McWilliams* is instructive for this case:

> [T]he matter is more properly treated as an original petition to this Court in keeping with the procedure directed in Petition of Tennessee Bar Association, 539 S.W.2d 805 (Tenn.1976). There a direct action against the members of this Court in their official capacities had been attempted in a chancery court. This Court enjoined those proceedings and had the matter transferred here for consideration as a direct petition concerning the promulgation and application of Rule 42. In the course of one of the opinions in that case it was stated: "The Court has undertaken to extend to any member of the profession who questions its actions in any manner

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Allen v. McWilliams, 715 S.W.2d 28, 32 (Tenn. 1986). As the Court has already determined in this case, the General Sessions Court's Order, purporting to apply Rule 13, was not appealable under the statute providing for regular appeals from the General Sessions Court to the Circuit Court. (June 25, 2009, Memorandum Opinion & Order). Thus, the Public Defender has sought review of the Order by the only means available to him—the common law writ of certiorari.

> the right to file a petition, at any reasonable time, to ask the Court to reconsider or modify those actions.

539 S.W.2d at 810.

> The Court has on several occasions received direct petitions to modify its existing rules, such as those governing professional advertising or conduct. Insofar as the matter is covered by our Rules, the same privilege exists for any member of the profession to seek modification or revision of Rule 13 and its interpretation or application either by the Court or by its Executive Secretary. We deem this the more appropriate procedure and, as stated, have treated the Rule 11 application filed in this case as such a petition.

See also In re Burson, 909 S.W.2d 768, 769 (Tenn. 1995).

The General Sessions Court has the authority to appoint counsel in misdemeanor (and other) criminal cases. Rule 13, Section 1(c), Rules of the Supreme Court of Tennessee. Similarly, under Rule 13, the General Sessions Court is vested with broad discretion concerning such appointments:

> (4) (A) When appointing counsel for an indigent defendant pursuant to section 1(e)(3), the court shall appoint the district public defender's office... if qualified pursuant to this rule and no conflict of interest exists, unless in the sound discretion of the trial judge appointment of other counsel is necessary. ***
>
> (B) If a conflict of interest exists as provided in Tennessee Rules of Professional Conduct 1.7 or the public defender is not qualified pursuant to this rule, the court shall designate counsel from the roster of private attorneys maintained pursuant to section 1(b).
>
> (C) The court shall appoint separate counsel for indigent defendants having interests that cannot be represented properly by the same counsel or when other good cause is shown.
>
> (D) The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards.

The General Sessions Court was the appropriate venue for this Petition. Rule 13 explicitly vests that court with the authority and discretion to make the decision requested—will additional misdemeanor appointments to the current caseload of the Public Defender "prevent counsel from rendering effective representation in accordance with constitutional and professional standards[?]"

The appropriateness of the petition filed by the Public Defender is made clearer by an analysis of the State's argument.

The State's argument that Rule 13 decisions affecting a Public Defender's Office must be made on a case-by-case basis is unsupported either by law or logic.

The State contends that the decision about whether "adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards" must be made on an individual attorney, case-by-case basis. (State's Brief on Petition for Writ of Certiorari, at pp. 16–17). As set forth in the Memorandum of Law Regarding Court's Authority to Grant Public Defender's Requested Relief (filed in General Sessions Court on June 6, 2008) and in the following portions of this brief, the State's argument is without merit.

Initially, it should be noted that the State ignores the requirement of Rule 13 that the court, when appointing the public defender, must appoint the "public defender's office" and **not** a particular attorney in that office.

However, if the General Sessions Court were allowed only to make a Rule 13, Section 1(4)(d) decision for "a particular lawyer" in a single case (State's Brief on Petition for Writ of Certiorari, at p. 17), then the "public defender's office" would **never**, as a practical matter, be able to present the concerns of that "office" and the caseload of that "office" to the Court. In each such case, as posited by the State, the decision would then be whether the existing caseload

of "a particular lawyer" was so burdensome that "adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." If the Court agreed, the **individual attorney** would not be appointed. If the Court disagreed, then the matter would go forward. The attorney could raise—if at all—only the issue of **her** appointment to the **particular** case.

Such an interpretation would frustrate the effort of the Supreme Court in Rule 13 to ensure that the public defender's **office** is not overburdened with appointments. The sworn petition, addressed to each of the five judges of the Knox County General Sessions Court is consistent with Rule 13, and appropriate under *Allen v. McWilliams*.

The five Judges of the General Sessions Court were entitled to sit together, and hear the evidence presented by the Public Defender at a single hearing.

Not only were the proceedings before the General Sessions Court lawful, but also it was entirely appropriate and within the power of the five General Sessions Judges sitting together to hear the case.

The previously cited Supreme Court opinion in *Taylor v. Waddey*, 334 S.W.2d 733 (Tenn.1960), explicitly approves of all of the General Sessions Judges in a county sitting *en banc* to hear evidence and decide a matter within their discretion. *Id.* at 734.

As the Supreme Court noted in *Taylor*: "The action taken herein [by the five judges sitting *en banc*] amounted to no more nor less than the individual action of each judge." *Id.*

Similarly, in this case, Judge Geoffrey P. Emery stated:

> Some people might ask, Why are we all here en banc? All five judges were served a copy of this petition for relief by the Public Defender, and we think that for the purpose of judicial efficiency and economy that it is prudent to hear all the proof in regard to this matter one time rather than five. The decision as to whether to grant the relief that the Public Defender has sought obviously is

> going to be a decision made by each judge, but it makes a lot more sense to have one hearing rather than five hearings.

(Transcript, June 10, 2008, hearing, at pp. 5–6)

As Judge Emery made clear in his opening remarks, the five judges of the General Sessions Court in this case, just like the five judges in *Taylor*, sat together as a matter of convenience and judicial economy. The judge of each division of that court signed the February 25, 2009, Order, denying the relief sought in the sworn petition for her or his division. The procedure was appropriate, an exercise of judicial economy, and squarely within Supreme Court precedent.

The judges correctly viewed the Petition "as a proceeding held pursuant to Rule 13." (Transcript, June 10, 2008, hearing, at pp. 5–6). The judges offered the State the opportunity to call witnesses, but counsel for the State demurred, preferring to offer only legal argument, and no evidence. (*Id.* at pp. 7–8) At the October 29, 2009, hearing, the State complained that at the June 10, 2008 hearing, "the public defender put on a massive, voluminous, but one-sided case." (Transcript, Oct. 29, 2009, hearing, at p. 33) If the evidence was "one-sided," it is solely and completely because the State decided, for whatever reason, **not** to call or cross-examine witnesses, as invited by the judges.

The Public Defender followed the correct procedure in filing his Petition. Likewise, he followed the correct procedure in bringing the issue before this Court through a Writ of Certiorari. There is no other way in which he can obtain review, and the relief to which his office is entitled under Rule 13.

As shown above, the General Sessions judges have the power and the discretion, granted by Rule 13, both to 1) appoint counsel for indigent criminal defendants, and 2) decide who shall be appointed. There is a solid precedential foundation for the Public Defender's initial Petition to the General Sessions Court, for the entry of an Order on the Petition by the judges of that

Court, applying Rule 13, and review of that Order by way of the Writ of Certiorari. As argued on the merits before this Court on October 29, 2009, the Public Defender is entitled, on the record before this Court, to the relief he seeks. That relief should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing pleading upon the following individual(s) via hand-delivery or United States Mail, postage prepaid, and correctly addressed as follows:

Douglas Earl Dimond
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P.O. Box 20207
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This 25th day of November, 2009.

T. Maxfield Bahner
Hugh J. Moore, Jr.
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TRANSCRIPT OF PROCEEDINGS

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

October 29, 2009

IN RE: PETITION OF KNOX COUNTY PUBLIC DEFENDER) Docket No.: 174552-2

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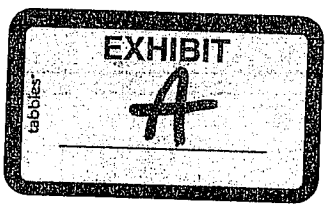


BE IT REMEMBERED, the above-entitled cause came on for hearing this 29th day of October, 2009, before the Honorable Daryl R. Fansler, Chancellor of Said Court, when the following proceedings were had to wit:

* * * * * * * * * *

THE COURT: Good morning. Are we ready to proceed in the matter of the petition of the Knox County Public Defender?

MR. MOORE: Ready, your Honor.

THE COURT: All right. We are now ready. Very well. You may proceed, Mr. Moore.

MR. MOORE: Thank you, your Honor. Your Honor, I am Hugh Moore of the Chattanooga Bar appearing for Mark Stephens, the Knox County Public Defender.

With me today is Max Bahner from our firm, Aaron Love from our firm, and you know Mr. Stephens.

This case is about, at its core, it's about the right to counsel. It's about the right to counsel that is guaranteed by the Sixth Amendment of the U.S. Constitution and by the Tennessee Constitution.

Rule 13 of the Tennessee Supreme Court rules was designed to ensure that indigent defendants in this state receive the level of representation that was mandated by the constitution.

Rule 13, which is sort of at the center of this writ, is how the Tennessee Supreme Court decided to implement Gideon, the requirements of Gideon, and the other case law that defines an individual's right to have effective counsel.

And I think that's important. A defendant is entitled to effective counsel. A defendant is not entitled to win his or her case, but a defendant is entitled to effective, professional representation.

And that is what Rule 13 is set up to ensure. It's set up to ensure that each indigent individual, who appears in front of the courts, receives an attorney who can provide that individual with representation that is effective and professional and it meets a certain standard that the Supreme Court has set.

And that is what we are here about this morning. Mark Stephens, who is the elected public defender for Knox County, his office is charged

with this responsibility. He has a first-line responsibility of providing this effective and professional representation to indigents here in Knox County.

Mr. Stephens brought the petition to Sessions Court. And in that petition, and the affidavit with it, Mr. Stephens says that he is fearful, that if something is not done about the caseloads in his office -- and he suggests that something be done about the misdemeanor caseloads; if something is not done about the extraordinary heavy caseload in his office, that his office would not be able, very soon, to provide the level of effective representation that Gideon and the other case law, the U.S. Constitution, the Sixth Amendment, the Tennessee Constitution require, and that Rule 13 is designed to ensure, that every individual who appears has that representation that is guaranteed and mandated.

Now, we are keenly aware of the financial considerations here, but we don't think that's at issue.

Mr. Stephens' office has a constitutional responsibility. His responsibility is not to the individual courts; his

responsibility is to the individuals that he is appointed to represent, the men and the women who Mr. Stephens and his office is appointed to represent.

And as I said, Rule 13 sets out exactly how that mandate is to be applied. And Rule 13 has mandatory requirements.

We are here today and we are asking this Court to find, based on the record -- of course, this is on this writ of certiorari. The Court is bound -- we are all bound by the record and we can't add or subtract anything from the record. But, on the record, we think -- very specifically, based on the June 10th, 2008 order of the General Sessions judges, we think that the public defender is entitled to the relief that he sought.

And what we are asking, is that this Court find that we are correct. And then what we are going to suggest, what we do suggest, is that the Court perhaps refer the matter then, back to the Sessions judges to work in consultation with Mr. Stephens and to work out some sort of a remedy that's acceptable to everybody.

Just briefly, to go back through the procedural history of this case, Mr. Stephens

filed a petition in Sessions Court. There was a hearing on June -- excuse me -- there was a hearing on June 10th, 2008, an all-day hearing, all sorts of witnesses. There was an order eight months after that.

In response to that order we then filed a petition for a writ with this Court. The writ was granted. The record was transferred up here.

There was then a motion to dismiss that was denied, and we are here this morning on the merits of that.

What I want to do this morning is to briefly discuss our argument. Of course, we have filed a brief that sets forth our argument in detail, and I will briefly discuss that. I will explain why we think Mr. Stephens' office is entitled to relief and why the procedure that we have employed is an appropriate legal procedure.

And then second, I want to respond briefly to the two arguments that are raised by the state in its brief. They have raised two arguments in opposition to the relief here.

Those arguments are, first, that the remedy of a writ of certiorari is not available because Mr. Stephens had the right to take an

appeal.

And the second argument the state raises, is that the Supreme Court rules don't allow the office to seek an office-wide remedy; the remedy is only available to individual public defenders on a case-by-case basis. And I want to discuss that briefly.

First, just in passing, I want to note an error in the state's brief. The state asserts, at page 4 of its brief, that their motion to intervene remains undecided. And as the Court will recall -- and I have got a transcript page here for the Court.

THE COURT: I was under the impression, Mr. Moore, that you-all voiced no opposition --

MR. MOORE: We had no opposition, your Honor, and your Honor granted it and asked Mr. Diamond to prepare the order.

MR. DIAMOND: My mistake, your Honor.

MR. MOORE: Okay. And that's my -- let me start with Rule 13. I want to read two very short portions out of what is a very long rule. I also have a copy of the rule for you.

THE COURT: I have it.

MR. MOORE: Rule 13. I think it's

Section 1. It's (e)(4)(A). "When appointing counsel for an indigent defendant pursuant to Section 1(e)(3), the Court shall appoint the district public defender's office if qualified pursuant to this rule and no conflict of interest exists."

Then down in section (D): "The Court" -- that is the appointed Court -- "shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards."

I think it's important to note, first of all, the rule is mandatory. "Shall not make" the appointment once the requisit showing is made and the burden has been met.

And I think that, second, it's important to note that the rule itself speaks in terms of the public defender's office, not an individual public defender. It speaks of individual appointed attorneys and the public defender's office.

And it's the public defender's position,

in this case, that once the General Sessions Court made the determination that the number of cases that were handled by attorneys in the public defender's office "violated professional standards," using that phrase in Rule 13, then the relief was mandatory.

That is where we get to the fundamental illegality; that is, that there is a factual finding, and then the ruling, relating to that factual finding, is not the ruling that should have been made based on those facts.

Now, in its brief the state concedes that the Sessions Court made a factual finding that professional standards were being violated by these misdemeanor caseloads.

I think this is a very important concession by the state. It's at page 13 of the state's brief. "The state agrees with the public defender" -- let me quote the state, because this is very important.

"The General Sessions Court apparently decided that the public defender had met his burden to prove that the caseload exceeded some professional standard." That's at page 13 of the state's brief.

It's important, because the state, in agreeing that the public defender met his burden -- that's the state's language -- they agree that the public defender had met the burden of making this clear and convincing showing that it was being compelled to provide representation that was not in accordance with the standards of Rule 13.

And that is the only burden that had to be met, that there was only one burden at issue in front of the Sessions Court, and that was: whether we could meet that burden of making that clear and convincing showing? And the state admits that we met that burden.

The public defender, at that hearing, and then as represented in the Sessions Court order, presented quantitative evidence of a qualitative problem. And it's true the presentation of that quantitative evidence of the qualitative problem, that Mr. Stephens had met his burden.

Now, I would submit to the Court that there is nothing unusual about using numbers of a quantitative measure in order to reach -- using numbers, a quantitative measure, in an effort to

reach -- and the quantitative measure here is the number of cases. There is nothing unusual about that, which the Supreme Court has used, in order to reach a qualitative result.

And a qualitative result, that the cases mandate and that Rule 13 was designed to ensure, is as I mentioned earlier, effective representation.

And the Supreme Court, in Rule 13, really anticipates that there will be quantitative proof, because it assumes from its very language that, at some point, one more case, one case, would result in a defendant not receiving legal services that meet professional and constitutional standards, because the rule says if you can show that this case, this one case, puts you at that level, that you have too many cases and you can't deliver effective representation. As Rule 13 says, adding the appointment, the one appointment, to the current workload.

Now similarly, for example, like in state DUI law, it assumes that .08 is the level for impaired driving, whereas, depending on the size, weight, whatever individual alcohol tolerance of an individual -- really it might be

.6 for some and .10 for others -- but the law assumes, for the purpose of keeping roadways safe, it assumes this .08 level. And I think that's -- I have tried to come up with some analogy here, and it's roughly analogous.

The Supreme Court has said you can look at constitutional standards, you can determine, you know, in this individual case was there constitutional representation?

But then in addition to that, not necessarily over and above, but in addition to that, we are going to say you also can't have too many cases; you know, we are going to say, that at some point -- at some point that's just too many cases.

And the state mentions in its brief that one public defender -- and I think this is at page 12 in the state's brief -- one public defender, through hard work, intelligence, whatever, may manage to provide quality legal assistance in spite of an overwhelming caseload.

And that is true. I mean, it's true, that if you ask -- the testimony from Ms. Poston and Ms. -- the two --

MARK STEPHENS: Murray.

MR. MOORE: -- Murray, the two assistant public defenders who testified in the Sessions Court hearing, was that, well, you know, yes, they just kept accepting the appointments, you know, the individual -- they were, you know, yes, you know, I think I can work that in. I think I can work that in.

But the -- you know, as much as the Legislature can establish this .08 standard for DUI, the Supreme Court has established this professional standards' limit for lawyers.

And through its opinion in the Baxter case, the Supreme Court -- and I have copies of those cases -- the Supreme Court, in the Baxter case -- and I have a copy for your Honor, if your Honor --

THE COURT: Very well. Just hand it to me.

MR. MOORE: Thank you. In the Baxter case, please, the Supreme Court says -- this is at the bottom of page 6, the bottom left-hand going to the right-hand part -- it says, "Trial courts and defense counsel should look to and be guided by the American Bar Association Standards relating to the administration of criminal justice and,

specifically, to those portions of the standards which relate to the defense function."

And as Professor Lefstein detailed in his affidavit, and then in his testimony at the Sessions Court hearing, he explains how these ABA standards, that the Supreme Court instructs trial courts to look to and be guided by, it says -- this is Judge Henry's opinion, more than 30 years ago. "Trial courts should look to and be guided by these standards."

And in his testimony and affidavit Professor Lefstein explains how these NAC numbers are, in fact, those standards.

Once the showing -- once we have made the showing of the violation of the quantitative standards -- and we have shown that. And the state admits that. The state admits that Mr. Stephens' office made a showing in Sessions Court.

And the Sessions Court, in it's June 10th order -- and you know, really, because we are all bound by the record here. Looking in that order, it's sort of the center part of this case, in that order the Sessions judges said, we admit that, you know, you have proved a violation of

some professional standards here.

Once that showing has been made, and once we have met that burden, then we are entitled to relief. Just like the case that we cite -- what is it?

MR. LOVE: State versus Gant.

MR. MOORE: -- the Gant case, on fundamental illegality. It's cited in our brief, but the State verses Gant case. That's the case, your Honor, where a trial court judge had a hearing on the warrantless seizure of items from a cell, a prisoner's cell. And the Court found that there was this warrantless seizure of items from the prisoner's cell, and then the Court ruled that that had to be excluded from evidence.

And that was taken up on a writ of certiorari. And it was found to be a fundamental illegality, because, based upon facts found by the Court, that it was a warrantless seizure from a prisoner's cell, the evidence was not to be excluded, although, the Court did exclude it. And here, we are saying, that this is very similar.

You have a finding by the Sessions Court that this quantitative limit, this quantitative measure of qualitative -- quantitative limit has

been reached, that it had been over-reached.

And therefore, the Court's conclusion from that was simply wrong. That is, what we are saying, is if you reach that conclusion, that is set out in the June 10th, 2008 order, the only result, looking at Rule 13, which is mandatory, the only result that can come from that is the relief that we seek.

And as I mentioned, the relief that Mr. Stephens sought, in the original petition, was an end to further misdemeanor appointments until the situation can be remedied.

And as I said when I started the argument, I believe that, if appropriate, and the matter was referred by this Court back to the Sessions judges to work with Mr. Stephens, they could quite probably come up with some sort of a remedy that is satisfactory both to the judges and to Mr. Stephens' office.

Now, in its brief the state argues that these caseloads have decreased. And the state includes a table, I think, at pages 2 and 3 of its brief.

But what I would point out to the Court, is that the NAC standard -- and this is included

in Professor Lefstein's affidavit -- is 400 misdemeanor cases per attorney, per year. And I noticed, in subsequent studies the ABA made a recommendation that be reduced to 300 cases per year.

Mr. Stephens testified, and this is at page 17 of the transcript of the June 10th, 2008 hearing, Mr. Stephens testified that he assigned four public defenders to the misdemeanor cases from which he is seeking relief.

The chart that the state submitted showed 5700 misdemeanor cases in 2007. That would be a little less than 1200 per attorney, which is more than three times the standard that the state concedes is being exceeded; that is, the state concedes that the standard of 400 cases is being exceeded here. It's being exceeded almost by three times.

Let me turn to the state's brief, briefly. In its brief the state raises two objections to the relief that we seek. I would submit that neither one of those objections is even correct or sufficient to overcome the mandatory instructions of Supreme Court Rule 13.

First, the state argues that this

fundamental illegality basis for a writ of certiorari, that we base this proceeding in front of your Honor on, is not available, because -- and then at page 14 of the state's brief, they state: because an appeal is provided to the public defender by statute. Well, that's simply not true.

This Court held in its June 25th, 2009 order that -- I believe your Honor's language was it was abundantly clear that the Sessions Court order was not final because the judges said that we continue to look at these cases.

There is an appellate case directly on point, and I can provide a copy of that to your Honor. It's the case of State versus Osborne.

(Pause in proceedings.)

MR. MOORE: Thank you. State versus Osborne, Court of Criminal Appeals (1986) your Honor, over on the -- I guess the fourth page of that print, bottom left. The wording of T.C.A. 27-5-108 deems that "Before such an appeal" -- this is about appeals from Sessions Court.

"Before such an appeal can be taken there must have been a final judgment entered in

the General Sessions Court. An appeal under this statute" -- that's the statute that allows an appeal out of Sessions Court -- "an appeal cannot be had for the review of an interlocutory order."

That's exactly what we have here. So I think the state's first argument, that we are entitled to an appeal, I disagree with that.

And I think, again, there is a concession by the state in its brief that's important. At page 7 of its brief the state concedes that a writ will lie for fundamental illegality, one, in the absence of an appellate remedy, and we believe here there is the absence of an appellate remedy, and two, where there is a plain and patent error.

And as I said, the state here conceded that the Sessions Court decided that the public defender had met its burden. We believe, in our view, it then becomes mandatory.

The other argument advanced by the state is office-wide relief; Mr. Stephens coming into the Court and seeking relief for his office is not possible and that the decisions have to be made, as the state says in its brief at page 17, out of one court, adjudicating one -- one court

adjudicating one individual case.

And as we noted in our June 6th, 2009 memorandum, that is not true. If that were true, then in Rule 13 the Supreme Court would not have referred, very specifically, to "appointment of the public defender's office."

All of the other references in Rule 13 are to individual counsel, but not the reference to the appointment of the public defender's office.

And there is a very good reason for this. In appointing the public defender's office, and not an individual attorney, the Court, that is, the General Sessions Court, the Criminal Court, that Court expects Mr. Stephens' office to handle the case. They don't expect the individual assistant public defender, or Mr. Stephens, whoever is there that morning, whoever happens to be appearing before the judge, that judge is not expecting that person to handle the case; they are expecting Mr. Stephens' office to handle the case.

And the office is appointed, so that Mr. Stephens, as the elected public defender, can make the best use of the resources in his office in how he assigns lawyers to cases and to courts.

For that reason we think that the state is wrong when it asserts -- and this is at page 17 of the state's brief -- we think the state is wrong when it asserts that the Court must appoint -- this is a quote -- "a particular lawyer from the public defender's office to a specific case."

And then the state argues only this particular lawyer can apply for relief under Rule 13. But that just doesn't make any sense. And that's really not the way things happen in the real world.

Now, as I have said earlier, specific attorneys out of Mr. Stephens' office are not appointed specific cases, because he may have to decide somebody else needs to handle that case -- so and so is going on vacation -- that case is too complicated for you -- I mean, all manners of other reasons. And it's up to the office to handle the case.

Under the state's theory, these individual assistant public defenders would have to constantly appear back in front of the appointed judge saying, I am sorry, I am going to be on vacation the next two weeks, can this go to

this? Can you move the appointment? You know, please relieve me of the appointment and have this attorney appointed.

And that is not practical. It doesn't happen. That is why the office is appointed and that is why the office can seek relief.

This relief is being sought because Mr. Stephens' office is over-burdened. It's not being sought because one of the twenty or twenty-five attorneys in the office is over-burdened.

If just one of the attorneys, or two of of the attorneys in Mr. Stephens' office, are over-burdened, that's a problem Mr. Stephens is supposed to take care.

The Courts expect Mr. Stephens' office to handle the work. It's incumbent on him, likewise, to tell the Court, as he did in his petition, when his office can't provide the effective representation that Gideon and the other cases, the Tennessee Constitution, the Sixth Amendment to the U.S. Constitution and Rule 13 are designed to provide.

Rule 13 sets out these standards where the public defender should not be appointed, and

Rule 13 contemplates when it is appropriate that the "office," rather than the individual lawyer, will be appointed; therefore, the Court has the power to determine that the office can't accept more appointments, not that John Doe or Jane Smith can't accept more appointments, but that the "office" can't accept more appointments.

Moreover, as a practical matter, and we have argued this earlier, if the public defender was required to accept these appointments on an individual attorney, case-by-case basis, and then make these arguments, the I-am-too-busy-argument, it would create an incredible burden on the Sessions Courts and the Criminal Courts, and the courts really wouldn't have much time to do other -- to consider individual arguments by public defenders about their cases.

Furthermore, let me point out, nothing in Rule 13, or the statutes that govern the appointment of the public defender -- and there is some mention of this in the state's brief, I think, at page 14 and 15 -- nothing requires the public defender to be available to accept appointments in all courts.

Mr. Stephens' duty, and the duty of each

assistant in Mr. Stephens' office, is to the individual client, and it's a duty to provide effective representation to that individual client.

Mr. Stephens doesn't have a duty, statutory, constitutional or otherwise, to the Misdemeanor Division of Sessions Court; he has that duty to the individuals that he and his office is appointed to represent.

In promulgating and setting out Rule 13 the Supreme Court exercised, not only statutory authority, but really its inherent power to regulate the practice of law in the state.

We think there is clear authority for the relief that the public defender seeks; that is because Rule 13 requires that the office be appointed. It only makes sense that the "office" be entitled to ask for the relief that we have sought here.

In conclusion, let me say briefly, your Honor, the state has conceded the essential points that underlie our argument; that is, first, the state conceded in its brief -- and we quote this again: "The General Sessions Court apparently decided the public defender had met his burden to

prove that his caseload exceeded some professional standards."

Second, the state conceded that if there were no appellate remedy, and there is no appellate remedy here, that there was "plain error and the remedy of a writ of certiorari was correct."

We think the relief for the office that we have sought, and Mr. Stephens has sought, we think that complies both with the letter and the spirit of Rule 13, of the law, of the law in Tennessee. We think it makes sense.

And finally, your Honor, we submit that the substantive relief requested in this writ of certiorari should be granted.

And as I mentioned when I started, we would suggest that the matter be referred to the General Sessions Court, sort of like you refer things to a master, but that it be referred to the Sessions Court, and Mr. Stephens, for them to get together, that's the people who are involved here, and to work out some appropriate relief that is satisfactory, both to the five judges and to Mr. Stephens' office.

Also, because the initial hearing in

this case was almost eighteen months ago, they may wish to have another hearing or get current facts. That's all, I think, very reasonable.

And like I said, we ask that -- we think that's an appropriate next step for this Court.

And that concludes my argument, and I am ready to accept any questions from the Court or the --

THE COURT: Let's hear from Mr. Diamond and then I may have questions for both sides, Mr. Moore.

MR. MOORE: Thank you, your Honor.

THE COURT: Mr. Diamond?

MR. DIAMOND: May it please the Court, I am Doug Diamond from the Attorney General's Office, here on behalf of the Attorney General in his official capacity, and the Administrative Office of the Courts.

Before I get into my argument I want to dispute a couple of supposed concussions that I made, at least their characterization by opposing counsel.

First, and this is one we have heard repeatedly in the argument just concluded, I am supposed to have conceded -- or the state is

supposed to have conceded that the public defender made a showing, by clear and convincing evidence, that his caseload violated professional standards.

And that's a little bit strong. What I actually wrote was: The General Sessions Court apparently decided the public defender had met his burden of proof that his caseload exceeded at least some professional standards.

But I go on to point out that those are professional standards promulgated by trade groups that are essentially -- lawyer groups.

But the General Sessions Court did got find that the public defender's caseload exceeded these standards set out by our own Supreme Court in the Rules of Professional Conduct.

And then I went on to discuss constitutional standards. We don't concede that the public defender made a case for exceeding all professional standards; possibly for some.

The General Sessions Court made no finding by clear and convincing evidence. It's hard to tell quite what finding the General Sessions Court made. And I am only talking about, not what I am conceding, but what the General Sessions Court found.

Secondly, the other concession I am supposed to have made is that there is no appellate remedy; certiorari is correct.

Well, that's not true on a couple of levels. First of all, on the appellate remedy, I did not maintain that an interlocutory appeal is somehow -- or an interlocutory order is somehow appealable.

Instead, what I said in my brief, was that there is a statutorily prescribed, regularized appeal, and that there is nothing to prevent the public defender from having filed, right away in the Circuit Court, if he felt the order wasn't final by which -- this reading here -- nothing has prevented the public defender from filing a motion asking for a final order and going forward regularly with a statutorily prescribed appeal to the Circuit Courts.

Otherwise, any interlocutory appeal entered by a Circuit Court, that finds the evidence in favor of one side or another, but leaves something else unresolved, is open to appeal to this Court.

And as I pointed out in my brief, one of the cases, one of the very few cases to apply

writs of cert, says that's a big issue with these writs of certiorari; you don't want the exception to prove -- or to swallow the rule. And that is precisely the danger that this Court runs in accepting and deciding this writ for certiorari.

Instead, if anything, it should refer the case back for a final order and a regularized appeal; that is why the Legislature set out the appeal system that it has.

THE COURT: What authority do I have for that, Mr. Diamond? I mean, I know that I can refer the case back under a common-law writ. To the lower tribunal I can remand it for further action consistent with this Court's opinion, but what authority do I have to refer it back and order the General Sessions' judges to enter a final judgment in that case?

MR. DIAMOND: Because you certainly have -- even broad certiorari authority. I don't think there is any prescribed -- you have got wide authority on appeal to order the remedy necessary.

If somehow there is the conception that the General Sessions Court did not enter a final order, I think it's required to do so. It just can't sit on an order, because that, in itself, is

barring the other side from the right to appeal.

And there are certain cases just on that point, where clerks wouldn't accept notices of appeal, for instance. The Court below has to timely provide a right of appeal.

You can't just sit or enter a final verdict that basically denies the relief sought and sit there for ten years on an interlocutory order.

I think that writ of cert is available for that. And you can order, as the superior tribunal, be it an inferior tribunal, to prepare a final order, so that the appellant can file a regular appeal in the case. I think that's precisely what writs of certiorari are aimed at, among other things.

But there is a vast quantity of caseloads saying that if the lower tribunal, or its offices, prevent a regularized timely -- they say a speedy, timely, adequate appeal, that is exactly what a writ of cert is aimed at correcting. So you have ample authority to do exactly that.

I also did not say that:if there is no appellate remedy then a certiorari review and

decision is correct. You have quote the absence of the appellate remedy and the fundamental illegality. And that will launch me to my argument, because we think both, that the public defender meet a standard.

When the public defender filed his petition in March of 2008, the public defender conceded that he was providing constitutionally adequate representation to his clients, both in the past and was continuing to do so.

He claimed, instead, a spective relief saying -- and he -- saying that further appointments might jeopardize his ability to provide constitutionally effective representation.

He based his petition solely on Rule 13 of the Supreme Court which says that the attorney should not be appointed if counsel can make a clear and convincing showing that had an appointment -- and it speaks in a singular, this is an individual case, regardless of whether it's the public defender's office as a whole -- which I have no problem with that, the interpretation of the statute, or the individual lawyer -- that adding an appointment to the current caseload will prevent the counsel from defending the defendant,

a defendant, constitutionally and professionally in an effective manner.

Now, we moved to intervene after the filing of that petition; in fact, that was the case -- that was the proceeding in which our motion was never decided; in fact, the order isn't final from General Sessions. That's the reason, more than anything, that you had a non-final order.

Therefore, since we were not allowed to intervene, on June 10th, 2008 the public defender put on a massive, voluminous, but one-sided case in favor of his petition.

The problem was this. While his case showed that he was perhaps not meeting -- or had a caseload in excess of some professional standards promulgated by national trade groups, he did not show or even allege that he was providing constitutionally ineffective representation.

And in fact, his on figures -- and he was the only person submitting evidence, the only party to the case. His own figures show that his overall total caseload dropped dramatically.

In 2006 he had 15,240 cases. And I am referring to the tables on page 2 and 3 of my

brief, which I think are what guided the General Sessions Court in a collateral proceeding with the Criminal Courts in this matter. So he had 15,000 cases in 2006. In 2007 that dropped to 13,204. In 2008, 11,511.

That's a 25 percent drop nearly, in the three years that he had. Similarly, he had a declining case caseload, expressed in percentages, between '06 and '07: 10 to 14 percent in '06 and '07. And those were the only figures available, because this was partly through '08.

His caseload dropped 10 to 14 percent in Sessions Courts. Twenty-five to thirty percent in the Criminal Courts. That is a marked drop.

I just don't see how the defendant can claim that he is currently supplying constitutionally ineffective representation, that his caseload is dropping, that he then can't continue to provide, what he has been doing all along, a higher caseload. It doesn't make logical sense.

Now, for some time nothing happened in Sessions Court. And perhaps for that reason the public defender petitioned in Criminal Courts to be relieved from representation there as well.

And they are not in the record, and they are not part of the Sessions record, I don't believe. But I think that they are important to this case, because they tend to show why Sessions Court wanted to go with this case rather than the Circuit, which was already skeptical of his petition.

And I would like to move this Court for permission to enter the filings and the orders of the Criminal Courts into the record in this case. I think you can probably take judicial notice of them; they are certainly up on the public defender's website, widely available and public knowledge.

The public defender withdrew that Criminal Court petition, after a fairly skeptical hearing, in the fall of 2007. Of course, in -- or 2008; excuse me.

MR. MOORE: Your Honor please, I am going to object to a discussion of something that is outside the perimeter here. A writ of certiorari is clear --

THE COURT: I would have to sustain that. I can't -- even if it's something I can take judicial notice of, it's not part of what was

before the underlying tribunal, Mr. Diamond, and I don't think I can consider it in this case.

MR. DIAMOND: Thank you, your Honor. The Sessions Court order went down in February of 2009 and, of course, we followed with a writ of certiorari to this Court.

This Court needs to bear in mind a writ of certiorari is an extraordinary remedy; it is extremely limited in its scope.

As now Justice Coch said, in Robinson versus Clement, Courts may not inquire into the intrinsic correctness of the inferior tribunal's decision, two, they may not reweigh evidence that support an inferior tribunal, and three, may not substitute a judgment for that of the inferior tribunal.

You know, there is -- this is our remedy, an exceptional remedy. There is an even more rare exception to the general rule a superior court may not inquire into the intrinsic correctness of the lower court decision, and that's the so-called "fundamental illegality rule."

It's rarely used. In State versus Johnson, I think the Court explained it fairly

well. The Court below had suppressed evidence that the state wanted to introduce in a criminal case. The ruling was clearly against the law and it had the effect of fundamentally killing the state's case. And as the ruling was interlocutory in nature, the state had absolutely no right to appeal.

The Supreme Court ruled a petition for certiorari was appropriate in that case. And now it's a fundamental illegality exception.

And here is the two things that we need to invoke that very rare exception, one, a plain and patent error, and two, that, has got to be coupled with the absence, the absolute absence in this case of an appellate remedy.

And that is true of every case that is applied to this doctrine, a total absence and preclusion, not just an interlocutory order with eventual appealability to be pardoned, but an absolute lack of appellate remedy.

The public defender can point to only four modern cases in which the fundamental illegality exception was applied. And Tennessee's appellate courts venture to enter into this very circumscribed arena. And they all relate to only

one issue: expungement.

Therefore, in Adler, from a trial court, and this is the first of the series of four cases, the trial court had expunged a criminal record, and the state was precluded by the Rules of Appellate Procedure from ever appealing that court's record. The court accepted the appeal as a writ of certiorari, because the court for the state was absolutely precluded from appeal.

As I mentioned earlier, they have to look at another factor: was there a fundamental illegality? And the appellate court said, no, there was not.

Then Gifford followed Adler. It's basically the flip side. Here, we had a defendant who was denied expungement, and again, under Rule 3(C) of the Rules of Appellate Procedure, had no way to appeal the adverse decision, ever. It wasn't just an interlocutory order. It was, as to him, a final bar-the-door.

The Court accepted the petition. And here, unlike the -- illegality, the trial court had refused expungement to a defendant who had pled guilty, but the statute didn't preclude people who pled guilty from expungement, only

those who were convicted by the trial court. There was never a conviction. So the statute doesn't apply.

You almost, as a ministerial matter, have to grant expungement if the party meets the standards of the statute.

Scates, again, very similar to Gifford, no other right of appeal. The trial court blatantly violated the law requiring, also as a ministerial matter, expungement, when no true bill was returned. And no true bill was returned in that case. The case was dismissed.

And "Robinson" is the final case, the same as Gifford and Scates: no right of appeal to a defendant. The trial court denied expungement on a contempt matter holding contempt was not a crime that could invoke expungement.

The Court, thus, said no. Contempt is a crime. It's a misdemeanor. Therefore, if you show that you were found innocent of this crime, or otherwise the case was dismissed, as a matter of absolute right, ministerially, the trial court has to grant the expungement.

Thus, in modern application, this fundamental illegality exception has been applied,

and only one classification, which obviously we don't have here, an expungement -- and has had two prerequisites, absolutely no possibility of appeal, not just an interlocutory, non-appealable order on its own, but no possibility of appeal.

And secondly, the Court's ruling is pretty much ministerial. It's not a matter of weighing evidence. There is no dispute about evidence. You either come in with a piece of paper showing what the disposition was of your criminal matter and, based on that piece of paper, you either do or do not have expungement. It's not a matter of debate or the weighing of evidence.

The public defender in this case meets neither of those prerequisites. Rule 13 requires a lawyer or an office to make a showing that an appointment would violate his ability to provide professional and constitutional standards.

They can't just sit on professional standards, which is what the public defender is trying to do in this matter; you have to look to constitutional standards as well.

And that is why I said in my brief you can violate -- you can have a caseload that

exceeds professional standards but still is within constitutionally effective representation. In fact, that is precisely what the public defender has necessarily said has been going on all along. He had higher cases in the past. He says he is providing constitutionally effective representation, so therefore, he is living proof that you can have caseloads that may violate some professional standards, yet do not preclude the provision of constitutionally effective representation.

And that is what the General Sessions Court found. They applied both words. Words have meaning; they are not put in there for no reason by the Legislature. You have got to show not only professional standards violated, but constitutional standards.

The General Sessions Court applied the rule and they weighed the evidence. They said apparently some professional standards had been exceeded. The public defender may have proved that much, but -- and they are certainly in a position to know, because he was prefacing in front of them on a daily basis, in addition to the pleadings, they certainly could take judicial

notice of the performance of the public defender in their courts. They said that the public defender had not proven that his caseload exceeded constitutional standards.

And while they didn't allude to it directly, I think it was because of the numbers that we put into a chart. We compiled his on numbers that showed dramatic caseload drops.

You can't say I am providing constitutionally effective representation at fifteen thousand cases, I am now at ten, but I can't take more or I won't be able to provide the same representation I could at fifteen thousand. It makes no sense.

Moreover, the public defender was not precluded from appeal. And I am not saying that the order was appealable. I believe it was. But this Court has ruled differently, and I am prepared to accept that. That doesn't mean that the public defender could not have applied for a final order; people do that all the time. And I said General Sessions can make it final.

Instead, he chose to plead to this court, perhaps because he didn't want to go back to the General Sessions or to the Circuit Courts

under the regularized set of standards provided by statute.

What he is trying to do here is short circuit an ordinary writ of appeal. There is nothing to prevent him from having asked for a final order. If that had been denied, he might have a better chance of coming to this Court.

Because the public defender has not shown any fundamental illegality, he is basically asking this Court to reweigh the evidence and find not only that --

THE COURT: Let me assure you I won't do that, Mr. Diamond.

MR. DIAMOND: I know you will not.

THE COURT: They either have -- and if I understand your argument correctly, you are saying that it was a failure of proof in the General Sessions Court, because he didn't prove both --

MR. DIAMOND: That is right.

THE COURT: -- the inability to provide constitutional representation and professional standards.

If I understand your argument correctly, and the other side has argued differently, if they are correct and you are wrong, I only have to

prove one, then we are in a situation where at least the General Sessions Court's satisfaction is that professional standards have been exceeded. Then the question is: what should they have done once that finding was made?

MR. DIAMOND: I think there is a little more nuance than that, your Honor, because the standard is not just national professional standards; it's just professional standards.

The Sessions Court didn't find, again, that he has exceeded the Supreme Court standards, our very own rules, not some trade group standards, but what are applicable requirements under the rules of the Supreme Court.

But I don't want to go into debating that too much, because I think you have got the nut of the argument there certainly.

I think that precludes certiorari under -- due to the general rule or the fundamental illegality exception.

But I do think, if you want to really look at where you have got certiorari jurisdiction in this case, just the general rule provides you ample, ample reason, to question whether the General Sessions Courts exceeded their

jurisdiction.

General Sessions Court is limited to jurisdiction over proceedings expressly provided for by statute, that's Caldwell versus Wood, a case I cited and attached to my brief.

The only statute, rule, or authority invoked here is Rule 13. And I don't care whether you characterize it as an office of lawyers or a lawyer; that is sort of a red herring argument.

It is clear from the language in Rule 13 it's talking about individual cases. It does not -- I am not aware of any other proceeding, in this state's history or in case law, that has interpreted Rule 13 to provide to the public defender a right to have a panel, not just an individual judge, but a panel of General Sessions Court judges, sit en banc and grant perspective indefinite relief to the public defender to withdraw from courts.

If anything, the public defender here is really inviting the General Sessions Court to invade on his own authority, which is to allocate his own resources. And we have cited cases, that part of an administrative officer's discretion and authority is to take the resources, which he or

she is provided, and assign them accordingly to what he is given.

And to ask a Court to cover an administrative decision with the imprimatur of a court order is bad public policy. It's involving the courts in what is essentially a political and administrative issue.

I am not sure what -- the AOC, I am sure, wouldn't be happy about it. I am not sure -- and we thought about it, what we could do if the public defender was simply to announce, I have been given X number of resources by the Legislature, I have looked at my caseload, I have got discretionary ability to sign whatever -- what few resources I have been given wherever I like, I am going to assign X number of lawyers to the X number of courts.

And I don't know. We could try a mandamus, I guess, but I think that would be a pretty tough row to hoe. I just don't -- I think it would be very tough, I will have to concede that. We might be successful, but -- even so, that's an administrative decision, and I don't think he should be running -- or cover a court order to a decision that is really granted to him

to allocate his own resources. That's up to him.

And courts really have no business interfering. And it's odd that an administrative official would ask a court to come in and essentially stick a court order on top of his own decision and cover it with the imprimatur of a court. Let the public defender decide his on cases -- or decide his own resources; excuse me.

So if you are going to grant a writ of certiorari, I think it's a lot easier, rather than trying to find this exception within the exception that's implied -- they don't apply to the modern days -- and only four cases, having no relation to this case, with no authority for any proceeding such as this -- I think it's a lot easier to look at the General Sessions Court case and say there is no authority for a General Sessions Court to convene five judges in a panel to sit en banc, to decide, not an individual defendant's case, but to grant to an entire administrative office, relief.

Perspectively, that permits that office to pull out of a class of case or a class of courts indefinitely with no antedate sought.

I just think that's well beyond the scope of the General Sessions Court's authority.

And probably the decisive factor of this case, if this Court should do anything on a writ of cert, it should simply vacate proceedings below and dismiss the petition. Let the public defender make his on decisions; that is why he was elected.

THE COURT: A couple of questions, if you are finished; I'm sorry.

MR. DIAMOND: I am.

THE COURT: All right. Let me take what I perceive is the situation in this case. And just bear with me for a moment.

MR. DIAMOND: Sure.

THE COURT: Let's presume that the public defender has carried the burden by showing that the professional standards have been exceeded.

MR. DIAMOND: Yes.

THE COURT: You have argued the Adler case regarding the expungement order, the comments that it essentially is a ministerial function of the judge at that point.

If I read Rule 13, and with those presumptions I have asked you to bear with me on for just a moment, if the Sessions Court found -- and I will use your argument -- if the Sessions

Court found that an additional appointment would prevent counsel from rendering effective representation in accordance with constitutional and professional standards, if they made that finding, what choice would they have but to refuse to make the appointment?

Because the rule, which has the force of law, says the Court shall not make an appointment. I mean, there is no discretion. I mean, it's nothing but ministerial. They have to go to someone besides the public defender's office.

MR. DIAMOND: In an individual case, only if the public defender shows, by clear and convincing evidence, not only professional standards, which you have asked me to assume, and I will, for the purposes of this question --

THE COURT: Right.

MR. DIAMOND: I hope I am following your question --

THE COURT: All right. I even took it further. I said assume that they found that they both were exceeded.

MR. DIAMOND: Uh-huh, because he has got to show also that this would prevent him from providing constitutionally effective

representation. That's precisely what his own --

THE COURT: Well, I muddled that up when I said "clear" on you.

MR. DIAMOND: I understand.

THE COURT: Let me just presume for a moment that the Sessions Court had, in this hearing, said okay, we find that the public defender has proven, by clear and convincing evidence, that the additional appointments would prevent counsel from rendering effective representation in accordance with constitutional and professional standards. Let's accept your argument. I will do that. I will accept yours instead of theirs.

If I accept your argument, and they had made that finding, then they would have to refuse to make the appointment.

MR. DIAMOND: I agree.

THE COURT: And to insist that the public defender take the appointment would be a fundamental illegality, because --

MR. DIAMOND: Yes.

THE COURT: -- they are ignoring a clear rule that has the force of law.

MR. DIAMOND: I think you are right in that distinction you are making.

THE COURT: Okay.

MR. DIAMOND: And I apologize I didn't convey that clearly. It's been --

THE COURT: All right. Good.

MR. DIAMOND: Yes. We think he has to prove both. And he, in fact -- his own -- prove both.

And I will also mention, in terms of exceeding his jurisdiction, or acting illegally, the Court never did decide our motion to intervene.

So all we saw was one side's proof. I had no opportunity to test that proof. And that's concerning as well. Because this is -- it's a proceeding -- it's a judicial proceeding that presents as an adversarial proceeding. We got one side of the picture.

But I think we don't need to go there, particularly, because I think the public defender's figures seal his fate, and he did it in the General Sessions Court with these five judges who sit and watch the performance of the office every day, who have read the pleadings and have

read the rule, understood those two prongs, professional and constitutional, the duty had from both, not in there -- they are in there for a reason. They said, yeah, we'll assume with you. Professional? Yeah. Constitutional? No.

If you start looking at "constitutional," you start reweighing the evidence. And I know you are not going to do that.

But in order for you to get to constitutional, there is only one way you can do it, and that's to reweigh the evidence. And I think that's what this is, is a fairly -- disguised attempt to ask this Court to do just that. And I know you will not.

THE COURT: In regards to that, the issue, as far as I see it, is either Rule 13 requires both or it does not?

MR. DIAMOND: Well, if that's the issue you see, we'll perfectly happy to live with it.

THE COURT: Well, that's it. There is no reweighing whether they met their burden on the constitutional --

MR. DIAMOND: We agree.

THE COURT: I live with what they said,

whatever it is. All right. Mr. Moore, I do have a couple of questions.

MR. DIAMOND: Thank you.

THE COURT: If you wish to respond first, then I will --

MR. MOORE: Yes, briefly, your Honor, on a couple of points. I don't think Rule 13 does require both. If you read it to require both, it reads the professional standards out of the rule.

It means then that just the constitutional standards trump everything; that is, you can violate all of the professional standards of the world, but not until you violate the constitutional standards is there a violation of Rule 13.

The Court wouldn't have said "both," if the word "professional" standards was to be meaningless.

And it would be meaningless under the state's arguments, because the state surely is not arguing that you could -- that you could provide representation that met professional standards, but was unconstitutional, and that that would be okay.

And surely I don't think they are -- I

mean, they each have to mean something. And under the state's reading then, the word "constitutional" trumps everything.

Proving a violation of professional standards doesn't mean anything. You proved a violation. You know, so your violating a professional standard doesn't make any difference.

If it's constitutional, then you are okay; you know, you have to go ahead and take the appointment.

So I very seriously don't believe that the Court intended to write in Rule 13, as your Honor read, adding that appointment would prevent counsel from rendering effective representation in accordance with constitutional and professional standards and then mean to have half of that be meaningless.

Briefly, on one other point, the reference -- I think there were three or four references in here to these numerical standards from the NAC being trade group standards.

And again, I would just refer the Court to Justice Henry's opinion in the Baxter case. The Supreme Court said, Trial Courts should look to and be guided by the American Bar Association

standards relating to the administration of criminal justice.

It's not like the, you know, the National Association of Stove Manufacturers. I mean, the Supreme Court says that's what you are supposed to look at. You are supposed to look at those standards in making your determination.

Very briefly on another point, without going back and asking the Sessions Court to enter a final order, well, when you think about that, the order here was not -- it's not like they left off an assessment of cost or didn't make a Rule 54.02 finding.

The fundamental order is: we thought about this, we heard your hearing, we held this for eight months. The Court held it for eight months before issuing the order and, after eight months, they issued this order that said, you know, we find that you proved that you didn't meet professional standards, but we are going to keep looking at this, and we'll look at it -- I think it says, every quarter.

So it's not like I am just going back and saying, excuse me, you forgot to assess cost in that, or excuse me, you have got more than one

party here, you need to put the Rule 54.02 magic language in it and you'll have a final order and can take an appeal on it.

You would be going back and asking the Sessions Court to completely rethink the decision that they made after eight months of thinking about it. And it's not simply a ministerial matter.

I think those are the only points I want to make in response, so I am ready to respond to any of the Court's questions.

THE COURT: All right. Mr. Diamond has questioned the General Sessions Court's authority to sit en banc and issue this order. If it is not an adversarial proceeding -- I think, in the transcript, in response to his motion to intervene, they said it's not an adversarial proceeding.

MR. MOORE: And I believe they offered him an opportunity to cross-examine.

THE COURT: But anyway, their intent was that it not be an adversarial proceeding.

MR. MOORE: Yes.

THE COURT: It seems to me like it's more an informational-gathering process on the

part of the judges, and then they put down this order.

And from day one I have been struggling with what this animal is I am dealing with, Mr. Moore.

I don't have an adversarial proceeding. I don't have an administrative board. I have got five judges, with no particular case, sitting en banc, issuing what you would perceive to be an administrative order. And I am not sure what they have created there.

Mr. Diamond pointed out in his brief that the General Sessions Court judges don't even have statutory authority to amend their own judgments once they become final.

There is no Rule 60 motion in Sessions Court. He says you can ask them to make a final judgment. I don't know of any 54.02 being in Sessions Court --

MR. MOORE: Right.

THE COURT: -- how they can make a final judgment on part of a case. But likewise, I am not sure what they have done here and what I am being asked to do with whatever they have done here.

MR. MOORE: I'll certainly agree with your Honor that this is, in part, unchartered territory, and that would be -- Mr. Stephens didn't ask the Sessions' judges to hear the cases en banc.

The petition was filed. Obviously some thought was given to what do you do? What do you do to have it, have Rule 13?

You know, rather than have John Smith and Jane Doe come in each day with all sorts of witnesses and say, our office can't do this, you know, and do that in front of, you know, Judge Jackson and each of the -- Judge Emery, each of the judges down there -- what do you do? What do you do? And so we thought, well, let's file a petition.

The Court decided to hear it en banc. And quite frankly, just as an attorney, and this is not in the record or relevant to anything, we didn't know whether we were going to get five orders or -- you know, we didn't know.

The Court decided to hear that. And then the Court, after eight months of thinking about it, decided to issue that joint order signed by all of the judges.

So I think, with the intervention of the state here, which your Honor allowed, and we don't object to the state intervening or being here, I think it is an adversarial proceeding.

I believe that it is an adversarial proceeding. We are saying Rule 13 was violated; the state is saying that it wasn't. I think that's adversarial. I think that that presents a controversy for your Honor, for the Court.

THE COURT: Well, Mr. Stephens is not the first public defender to ever seek relief from appointments. I am aware of at least one case out of Florida where the public defender there filed a -- objected to the appointment and obtained orders in five different -- I won't say courts -- let's say "divisions" of a court. And they were consolidated for one judge to hear them. Certainly that would have made a better proceeding, because you have an actual pending case.

But the problem I have, is I don't even know if Sessions Court has a pending case with this petition.

MR. MOORE: Well, I mean, we are aware -- I mean, certainly we are aware, in

working with Professor Lefstein, who is, I guess, one of the nation's top experts on this area of the law -- and we are aware of those cases, of cases in Louisiana and Missouri and different places. In thinking it through here, this just appeared to be the best forum to proceed.

His problem was with, as the evidence in the Sessions Court transcript, and in Mr. Stephen's affidavit, in his quite lengthy testimony there, it shows that he thought about it.

And then going back to what I was arguing about earlier, it's up to him to run the office; you know, he has got to figure out what do I do with these twenty-four or twenty-five assistants? How do I handle all of this most appropriately?

And he believed that he could get -- looking at all of the numbers, he could get temporary relief from misdemeanor appointments in Sessions Court.

And he set out in great detail what that then would let him do. It would let him assign additional attorneys to the Criminal Courts, it would let him assign additional attorneys to

Felony and DUI parts of the Sessions Court. And that's what he thought, and that was the relief that he -- so, I mean I -- do I think we have an adversary proceeding in front of your Honor? I do think we have an adversary proceeding.

THE COURT: Well, obviously you do now; down there you didn't, necessarily --

MR. MOORE: Right.

THE COURT: -- which is -- I mean, we didn't have Jones versus Smith down there or State versus Smith --

MR. MOORE: No. And we didn't object to the state intervening down there. I mean, now I am glad they have the AOC represented here.

The whole aim of our proceeding, which started almost two years ago working on behalf of Mr. Stephens and his office, is to try to find a solution to a problem. And we have tried.

And I don't want to get into anything extrajudicial here, but I mean, we have tried at various levels to find a solution to the problem.

And certainly, taking a petition to the Sessions Court, was not the first line of attack of the problem, but it seemed to us to be appropriate at the time. It seems to us to be

appropriate, perhaps even more appropriate now.

We presented evidence to the Sessions Court that the Sessions Court found. It said we were right. I mean, the Sessions judges said you are right; you proved that you are violating these professional standards.

And it's not like the professional standards -- as I mentioned -- and I have these AVA reports here, I think, Judge --

THE COURT: I think you attached them.

MR. MOORE: It's not like the standard is 400 cases and you have 401. The standard is 400 cases and his office has 1200 per lawyer.

He saw it decrease by 15 percent or 20 percent. I mean, he still is -- and Professor Lefstein, in his affidavit, and particularly in his testimony to the Sessions judges, was quite eloquent in explaining what happens when you have a situation like that.

When you have a situation like that -- and Ms. Murray and Ms. Poston, who testified -- and of course only two assistants testified. But then the Sessions' judges agreed on the record all of the other assistants who were in the courtroom that morning, the Sessions judges

agreed on the record that their testimony they stipulated, accepted a stipulation the testimony of the other twenty-two or twenty-three assistants would be just the same as Ms. Poston's and Ms. Murray's testimony.

And so, what they were saying, was I don't have time to do this; you know, I am seeing people 15 minutes. I am not interviewing witnesses. I have worked with Professor Black in the clinic and I learned how to work up a case. Now I have got to work in Mr. Stephens' office and I find that I am appointed to, you know, 25 cases one day and I can see people out in the hall.

And it's not the way I think a case ought to be tried. What Professor Lefstein testified to, and it's in his affidavit and in his testimony, that the end result of this is quite -- I mean, I guess I can't say certainly -- but his testimony is quite probably, almost to a certainty, the end result of this, is people are pleading guilty to things that they are not necessarily guilty of, just because that's the system.

And as I said, the issue here is the effective representation of these individuals,

each man, each woman, who goes out there on Liberty Street and goes into the office of the public defender: are they receiving effective representation?

Are they receiving -- and can -- that is why the state's Supreme Court said professional and constitutional standards. It's why to ensure safety on the roads. We have a speed limit law. If I am driving back to Chattanooga, and I go over 70 miles an hour, I am violating the law.

No matter what excuse I have, I am sorry, I was in a hurry, there was nobody else on the road and I couldn't see anybody, over 70 miles an hour violates the law.

Also, there is a reckless driving statute that is subject -- if a state trooper sees me, and I am talking on a telephone weaving all over the place and running off on the side of the road, doing whatever, and driving 60 miles an hour, that's a violation of those standards.

The state trooper can arrest me for violating the quantitative measure: I am just going too fast or, the qualitative measure: I watched you drive, you need to get off the road. For whatever reason you are driving recklessly.

That's why the Supreme Court here said professional and constitutional standards. Constitutional is subjective. Are you providing constitutional representation to those people?

But the professional standards? I think the professional standards -- and I think that is why the Supreme Court let -- you know, it's not a laundry list. Its professional standards encompass, of course, the code of ethics. It's in the Supreme Court rules.

But those professional standards also, in looking back to the Baxter case, very specifically encompass these numerical standards, where the Court is saying, okay, you have got 24 hard-working people out there, who are doing their dead-level best -- as Ms. Poston and Ms. Murray testified -- to provide constitutional representation to everybody, but we, as the Supreme Court, are going to say, that you -- if you can show to us that you are being over-burdened, to the extent that these recognized professional standards, standards recognized in the Baxter case, are being violated -- and as he showed, his attorneys, we are not arguing a close case. Not 401. Not 420. It's 1200 on a standard

of three hundred or four hundred, if you can show that too. That is why we put professional and constitutional in the rule.

THE COURT: Well, there is no question, based on the evidence before the General Sessions Court, that the number of cases that the public defender's office is assigned per year is far greater than the standards that were presented to the General Sessions Court judges.

As I think Mr. Diamond agreed, the issue is: whether both constitutional and professional standards have to be met or if it's one or the other?

If both have to be met, then there is nothing in the General Sessions opinion -- actually the General Sessions opinion is that constitutional standards were being met --

MR. MOORE: Yes, your Honor.

THE COURT: -- and the professional standards were not. If you have to have both, that's the end of it. If you only have to have one, then Rule 13 says they shall not appoint. And they found one.

The problem I have in this case -- and I am going to invite you-all to brief this again. I

think you recall when we first started on this I said why do I have this case?

MR. MOORE: Yes, your Honor. I recall that very first time we were here in front of you.

THE COURT: There are important issues here and important issues regarding effective assistance of counsel.

It's been a long time since I was in General Sessions Court, but I recall three ways that you started a proceeding down there: a civil warrant, a criminal warrant, or a citation by an officer -- that's either a criminal or a civil citation. I guess that's four ways.

What I don't want to happen, is that we take this case -- and we have spent a lot of time on it. I can assure you that I, and a very abled assistant, have spent a lot of time on this case.

I don't want this to get to the Court of Appeals or to the Supreme Court and somebody says there was nothing here that was subject to the writ of certiorari, that there was no proceeding, no lawful proceeding in the General Sessions Court because there is no creature such as a petition.

And before we go any further I think -- I mean, I have been inviting this discussion of

how do I get this case, with this proceeding, whatever it is below? And Mr. Diamond has brought it up, with the question of the legality of what they did, whatever it is, in General Sessions Court.

And I think that we really need to hone in on this issue and I am going to invite both sides to brief this further. And I would like to have them within 30 days, that this needs to be brought to a conclusion.

MR. MOORE: Your Honor, I mean, we'll --

THE COURT: I think if I can come to grip with what I am wrestling with here, I can deal with this case straight away.

MR. MOORE: So what your Honor would like is a brief on procedurally --

THE COURT: The two issues: whether or not what we had is -- there has been a lot of talk about whether it's appealable or whether it's subject to a writ. I am not sure it's subject to anything, is what I am saying. I don't know that it's appealable or subject to a writ of certiorari, regardless of the form of the order.

MR. MOORE: All right.

THE COURT: And secondly, this en banc

order that they issued, I am not sure what that is, to be honest with you. I know the Sixth Circuit can do that.

MR. MOORE: Well, I mean, it appeared to us that it could be an individual -- that it could be -- it's signed by all five judges --

THE COURT: Right.

MR. MOORE: -- and that it could be --

THE COURT: Well, that's the nature of an en banc order --

MR. MOORE: Right, that exact order -- I mean, like five orders combined into one. I guess that's --

THE COURT: Now it's consolidated, I guess.

MR. MOORE: Right. That was one -- five. But yes, we look forward to the chance to brief it.

MR. DIAMOND: Your Honor, if I may? I think, because this is a jurisdictional issue -- I have addressed it, I don't think the other side particularly has -- it's hard for me to write -- it's really their burden to prove some kind of subject matter jurisdiction.

THE COURT: Jurisdiction --

MR. DIAMOND: -- and therefore -- and I don't know what you had in mind, but for each of us to submit briefs in 30 days, he needs to go first.

THE COURT: You have a good point. The jurisdictional issue is the petitioner's burden in that.

MR. DIAMOND: Right.

THE COURT: So I will ask them to submit something within 30 days. And you have already started on it. Mr. Diamond, two weeks? Or do you need 30 additional days?

MR. DIAMOND: I have a long-scheduled trip to Japan with my wife in the latter half of December. And I apologize for that. I would like to have it done --

THE COURT: Well, 30 days and 30 days? Would that be -- or is that -- that's not going to help you any or --

MR. DIAMOND: No. It's going to give me, effectively, two weeks --

THE COURT: Okay.

MR. DIAMOND: -- because I am leaving for Japan the 17th of December and back on January 4. So if you could set it like November 29, I

will just have that couple of weeks -- if you want me to look -- I will try -- I'll tell you what, if you would like, I will try to do it in those two weeks. And if you would be kind enough to be lenient should I need a few more weeks --

THE COURT: Sure.

MR. DIAMOND: We've all been pretty good about that. Opposing counsel and I have been -- I think gotten along very well in terms of extensions and all. So I will make every effort.

MR. MOORE: Can I have the 30th, Monday the 30th of November?

THE COURT: November? Fine. That's fine. The 30th of November. And you are departing when, Mr. Diamond?

MR. DIAMOND: I want to say it's the 17th. I am bad on dates. I think it's December 17th.

THE COURT: Well, look at it. If you need additional time, simply advise Mr. Moore. And I will tell you now that we will give you additional time.

MR. DIAMOND: All right. I'll do everything I can.

THE COURT: Because we need to -- I

mean, this needs to be dealt with right here, not ship it off to somebody else and prolong it. Because they are doing a lot of work down there, regardless of what standard you use. Let's put it that way.

All right. And I will -- I don't think you will need additional argument. I think we have got the issues laid out. And I will try to give you an opinion as quickly as I can after receiving your briefs.

I would like to get all of that together and bring this to a conclusion. It's awfully hard to pick this case up every three or four months and stay with it. So thank you. I appreciate the excellent briefs and arguments this morning.

MR. MOORE: Thank you, your Honor. We appreciate your --

THE COURT: Mr. Frye, we will recess until we can get that case back in here for an extra day.

(End of proceedings.)

C E R T I F I C A T E

STATE OF TENNESSEE :

COUNTY OF KNOX :

I, CAROLYN N. HOLTZMAN, Court Reporter and Notary Public, do hereby certify that I reported in machine shorthand the above proceedings, that the forgoing pages numbered 1 to 72 inclusive, were typed under my personal supervision and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel for any of the parties, nor an employee or relative of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand and official seal this 4th day of November, 2009.

_____

Carolyn N. Holtzman
Court Reporter and Notary Public

My Commission Expires: 05/04/2013

LEXSEE 334 S.W.2D 733

Brown Taylor, Judge of Part I, General Sessions Court of Davidson County, Tennessee, et al. v. R. B. Waddey and The Athens Bonding Company

[NO NUMBER IN ORIGINAL]

Supreme Court of Tennessee, at Nashville

206 Tenn. 497; 334 S.W.2d 733; 1960 Tenn. LEXIS 388

March 11, 1960, Opinion Filed

PRIOR HISTORY: [***1] FROM DAVIDSON

DISPOSITION: Judgment of Circuit Court reversed and order of sessions judges reinstated.

COUNSEL: Robert J. Warner, Jr., Shelton Luton and Elmer D. Davies, Jr., Nashville, for plaintiffs in error.

Hooker & Hooker, Nashville, for defendants in error.

JUDGES: Mr. Justice Burnett delivered the opinion of the Court.

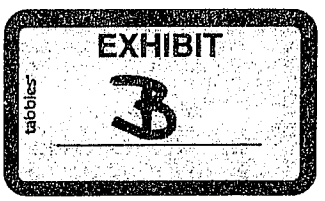
OPINION BY: BURNETT

OPINION

[*499] **[**734]** The five General Sessions Judges of Davidson County meeting *en banke* concluded that Waddey and the bonding company should be permanently suspended from writing bonds in the General Sessions Courts of Davidson County. To this action a common law petition for certiorari was granted by the Circuit Court wherein the petition was sustained because that court was of the opinion "the method by which bondsmen may be prohibited from doing business in any court has been covered and prescribed by statute, it is the opinion of this court that that method must be pursued. * * *" To this action of the Circuit Court the General Sessions Judges have duly perfected an appeal to this Court where able briefs have been filed and arguments had. We now, after reading these briefs and doing considerable independent research, are in a position [***2] to dispose of the questions here presented.

On May 13, 1959, one of the General Sessions Judges had notice served by the Sheriff on the appellee bondsman and bonding company to appear at a fixed place in the courthouse of Davidson County on May 20th at a fixed time "and then and there show cause why the order of November 12, 1958, approving the petition" etc. of the bonding company and its power of attorney, should not be revoked and canceled. On May 25th after the hearing, pursuant to this notice, the five Judges of the General Sessions Courts of Davidson County entered an order which among other things shows that "after the hearing of proof and the argument of counsel, it is an unanimous decision of the five Judges of the General Sessions Courts sitting *en banke* that the said Robert Waddey be permanently suspended from the writing of bonds in The General Sessions Court and it is, therefore, ordered, **[*500]** adjudged and decreed that said Robert Waddey is from and after Friday, May 22, 1959, permanently suspended from the writing of bonds in the General Sessions Court, and further that the show cause order in respect to The Athens Bonding Company be and the same is indefinitely [***3] taken under advisement." The action herein amounted to no more nor less than the individual action of each judge.

It was from this order that the above mentioned petition for certiorari was filed and granted by the Circuit Judge. The Circuit Judge apparently heard no proof in support of the petition for certiorari other than the orders above referred to and bonds etc. He considered that as long as the defendants in error, bondsmanand bonding company, had complied with Chapter 14 of the Tennessee Code Annotated, and particularly Title 40-1401 to 40-1412, T.C.A., there was nothing that the Sessions Judges could do to prevent the writing of criminal bonds by the defendants in error.



In a few brief words these provisions of the Code (40-1401 to 40-1412) provide in effect that one to write criminal bonds must show to the courts certain financial responsibility and then that those writing criminal bonds cannot fix cases. Some of the provisions go on as to how this financial responsibility is determined, whether or not and when investigation as to it can be made and as to other things pertaining thereto. In the instant case, as we understand the record, there is no claim of any violation [***4] [**735] of any of these statutory provisions and as we read the trial judge's opinion it is to the effect that since there is no allegation showing any violation of these statutory provisions then the courts herein were without any [*501] authority to regulate the action of bondsmen in writing criminal bonds in their respective courts.

Before getting into the merits of this controversy we should dispose of a question raised in the lower courts, and raised here, that is, that the writ of certiorari was not the right method by which to bring this matter before the courts, but that mandamus was the method that should have been employed to properly get the question before the court. We have investigated this matter to some extent, giving it a good deal of thought, and have finally concluded for reasons hereinafter expressed to accept the proposition as brought into court. Of course, mandamus is employed to compel performance, when refused, of a ministerial duty, while the writ of certiorari, at the common law, and now carried in our statute under Section 27-801, T.C.A., is quite different from that of mandamus. It is more or less designated to review and examine the proceedings [***5] of lower tribunals and to ascertain their validity and to correct any errors of law that are made by these lower courts, where there has been more or less some judicial action therein. In the instant case, if we take the theory of the bondsman, that is, that any action granting or refusing bonds on behalf of the General Sessions Judges is purely a ministerial duty, if we take this theory of it, mandamus, of course, would be the proper remedy. While on the other hand, if we take the position of the General Sessions Judges, that is, that they have a discretionary and inherent power, if this theory is accepted, the certiorari then, of course, would be correct. Thus in view of the divergent views as to what was proper under the record herein we have decided to accept the petition as brought to the lower court by certiorari.

[*502] *In re Carter*, 89 U.S. App. D.C. 310, 192 F.2d 15, 18, Judge Prettyman in an able dissent had this to say (It is certainly applicable in the instant case.):

> "The writing of bail bonds for pay is not an ordinary vocation the right to pursue which is a basic right and as to which the police power of a state is sharply limited. In the first place, [***6] the admission to bail is part of the operation of the trial courts. It is the placing of an accused in the custody of persons selected by him who become, so to speak, his friendly jailers. It is the substitution of one custodian for another. The surety upon the bail has power to arrest the accused. The granting of bail is governed by the Federal Rules of Criminal Procedure. (Of course, such rules have no application in our courts.) It is performed by a commissioner, judge or justice. (Of course, in this State it is performed as set forth in T.C.A., 40-1202 et seq.) Thus going bail is not an ordinary and independent vocation but is an integral part of the operation of the judicial system. In the second place, the bail bond is a contract with the Government. According to the doctrine of *Perkins v. Lukens Steel Co.*, 1940, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108, no person has a 'right' to do business with Government by contract. That doctrine is peculiarly applicable to bail contracts, because, from the very nature of the transaction, the qualification of a surety to appear upon even one bond is in large measure with judicial discretion."

We quote the reasoning here [***7] because it is peculiarly applicable to a situation in these State cases. The General Sessions Judges in this particular instance have all the judicial powers and rights of the Justices of the [*503] Peace under the various and sundry sections of the Code made and provided. *Hancock v. Davidson County*, 171 Tenn. 420, 104 S.W.2d 824. Thus it [**736] is that our statutes governing appeals and accepting bail, trial of cases and things of that kind before Justices of the Peace are applicable to the Sessions Courts.

Of course, the creation of the Sessions Courts some twenty-five years ago in this State grew out of a demand of the public that fee grabbing and things of that kind going on before Justices of the Peace should be stopped. Thus it was that General Sessions Courts were created and a high caliber of an individual elected by the people to govern and rule these courts. In ruling and running these Sessions Courts it is necessary for these individuals to exercise certain decorum and have certain requirements about those who work in and out of their court, very similar to that of a court of record, in order to keep this court on a high plane. This being true, the court

[***8] in the absence of any statute on the subject, whether it be General Sessions Court or courts of record, has certain inherent powers and rights to see that the courts over which they preside are conducted in an honest and upright manner by those who are officers of the court or who are dealing with the court.

The Supreme Court of Oklahoma in *Logan v. Hopkins*, 85 Okla. 278, 205 P. 1095, held that the District Court had inherent power in all cases to require such bond as would adequately protect the interest of the parties. The Pennsylvania Court *In Matter of American Bank & Trust Co.*, 17 Pa. Co. Ct. Rep. 274, 275, held that the courts of record there had inherent power to require security from persons subject to their order where the interest demanded [*504] the protection and that this was an inherent one essential to the due administration of right and justice which the Constitution has placed beyond the possibility of legislative interference. This is the general tenor, and should be what is right in the conduct even of courts that are not courts of record to try to get it on a right and decent plane. So long as the court in the conduct of its business makes requirements [***9] of this kind and these requirements are reasonable ones, and reasonable regulations, they clearly come within the reasonable police power and inherent power of these courts. The enactment of such reasonable regulations under the police power of the legislature results in no deprivation of property without due process of law. This statement is applicable, of course, to the statutory enactment setting forth certain rules and regulations to govern criminal bondsmen. There is no reason, in the absence of a statute, why the courts may not make similar reasonable regulations. So long as these regulations of the applicant are not capricious, arbitrary or solely without basis of right, then these acts may be properly supervised by the court in its ministerial capacity as here.

You say, what is inherent power? "An authority possessed without its being derived from another; a right, ability, or faculty of doing a thing without receiving that right, ability, or faculty from another." 43 C.J.S., p. 393.

The trial judge here seemed to have the clear opinion that because of the statute (40-1401 et seq.) hereinbefore referred to, making some requirements as to these bonding companies, this [***10] was the only thing that could be required of bondsmen by the courts. We respectfully think that he is in error in this because the statute is [*505] directory only and applicable to those things as required by these various sections of the Code. This statute does not by any stretch of the imagination attempt to cover the whole field of what is necessary for a bondsman before he is allowed to make bonds in the various courts. These statutes in no way attempt to interfere with the courts and tell them what their inherent power are or are not. It is merely saying that in such and such an instance that as far as solvency is concerned the bondsman will comply and that he must not do certain other things. This though does not attempt to take away the inherent right of the court to properly administer its affairs.

[**737] In *In re Carter*, supra, the District Court there in the majority opinion considered that these bondsmen were officers of the court to the same extent as a member of the bar was, and in supporting this proposition cited certain United States Supreme Court cases. We do not go this far, but we use this illustration in light of what this Court has very recently [***11] in *Ex Parte Chattanooga Bar Association*, 206 Tenn. 7, 330 S.W.2d 337, held unanimously that the courts of the State have inherent power to look into the question of the ethical conduct of the lawyers who are members of the bar. In other words, that this is the power of the court beyond and regardless of any statute on the question. This same reasoning applies in the instant case, and to various courts, even down to courts that aren't courts of record. The purpose is to keep their courts on a high plane.

Mr. Chief Justice Neil, writing for this Court in *Gilbreath v. Ferguson*, 195 Tenn. 528, 260 S.W.2d 276, stated the feelings of this Court in reference to the situation here under discussion. For the reasons obvious on the [*506] face of the Gilbreath opinion those things are *obiter dicta*, but we now, when the question arises, accept and adopt each statement published in that opinion in reference to what the judges of the respective courts may do in reference to accepting bail bonds in their respective courts. Such a situation must be in an effort to raise the standard and the respect of the administration of law in these criminal cases. This in a way when it [***12] comes to the attention of the court may be corrected far easier through the discipline of bondsmen who prepare the bonds before these courts than in any other way. So long as the bondsman complies with the statutes above referred to and meets a fair and reasonable standard in the conduct of his business before these courts then there is no one going to prevent him from practicing his profession therein.

When their profession is thus treated there is no violation of the due process of law because due process of law applies to a deprivation only. What we have said above is not contrary to the holding of the Court in *Concord Casualty & Surety Co. v. United States*, 2 Cir., 1934, 69 F.2d 78, 81, 91 A.L.R. 885. Even in that case the Court held that a District Court can refuse to accept a bond executed by a company in which the Court had lost confidence. That statement can mean nothing more or less than what has been said heretofore. This case (Concord Casualty Co. etc.) discusses the power of the Federal Courts in special disciplinary proceedings to restrain

a surety or indemnitor from acting in future cases and when that surety has committed some misconduct in the past. It was **[***13]** held that the Federal District Court was one of limited jurisdiction and under the Constitution and laws of the United States it was without jurisdiction **[*507]** in these proceedings. The Court though pointed out in a concurring opinion that it would undoubtedly have the power to refuse any bonds offered by the surety until it was satisfied that its business would be conducted in a proper manner. This statement of Swan, Circuit Judge, in concurring, certainly is nothing more than what we have been saying above. This case (Concord case) concludes with the statement, "The court's judicial act of approval of a bond is not mandatory under section 6, but the statute calls for the exercise of a wise judicial discretion." Thus it is that we do not find this case in any way out of harmony with what we have said above.

Lastly, it might be argued, and probably will be argued on a petition to rehear, that there is no showing herein of why these Sessions Judges voided the right of this bonding company to execute bonds before them. In the outset we showed that this bonding company was given notice several days prior to a hearing to show cause why this should not be done. The order shows **[***14]** that they did have a hearing and that after hearing the proof and argument of counsel it was the unanimous decision of these five General Sessions Judges that these bonds **[**738]** should be terminated. Clearly under this language upon which the petition for certiorari herein was based shows on its face that there was evidence before these gentlemen prior to their revocation of this license. In the absence of this evidence in this record we must conclude that these judges were eminently justified in revoking these bonds for good cause and that it has not been done arbitrarily or capriciously, and that there is clearly no abuse of their discretion in refusing to accept these parties. We feel that these parties have had a hearing and had they wanted other courts to pass on the evidence **[*508]** upon which they were suspended it was their obligation to preserve this evidence and bring it along up for us to see and not just depend upon the legal argument that they could only be bound by the statutory solvency provisions.

Thus it is, for the reasons above expressed, that the judgment of the Circuit Court is reversed and the order of the Sessions Judges above referred to reinstated. **[***15]**

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

MISDEMEANOR DIVISION

June 10, 2008

TRANSCRIPT OF THE PROCEEDINGS

IN RE: PETITION OF KNOX COUNTY PUBLIC DEFENDER	)	No. (None Assigned)

APPEARANCES:

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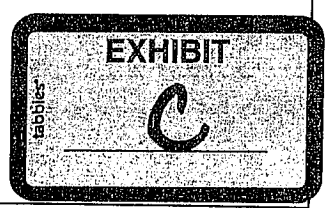

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JUDGE EMERY: And Ms. Sykes from the Administrative Office of the Court.

MR. STEPHENS: Your Honor, please, also - I'm sorry - Angela Williams is here on behalf of Max and Hugh and Aaron, as a part of that law firm, and she'll be assisting.

JUDGE EMERY: Okay. Thank you.

We are convened here this morning to hear proof of the Public Defender to suspend the appointment of cases of indigents in Misdemeanor Court. The Public Defender filed a sworn petition on March 26 of this year and requested the opportunity to present further proof in the way of live testimony to support his petition for relief.

We, as Judges, realize there is considerable interest in this proceeding, and that's why we've noticed the various agencies: State Attorney General, Administrative Office of the Court, Comptroller. Some people might ask, Why are we all here en banc? All five judges were served a copy of this petition for relief by the Public Defender, and we think that for the purpose of judicial efficiency and economy that it is prudent to hear all the proof in regard to this matter one time rather than five. The decision as to whether to grant the relief that the Public Defender has sought obviously is going to be a decision made by each judge, but it makes a lot more sense

to have one hearing rather than five hearings.

I think, first of all, we need to probably, at the outset, take up the issue that's been raised about the jurisdiction that was noted in the State Attorney General's response that we received yesterday. As to the authority to conduct a hearing on bond, I think we've covered that. We hope it will facilitate the proof here and allow each of us to make an informed decision of what issues and facts are involved. It is obviously undisputed that we have the authority to grant relief under Rule 13. There are some collateral issues to that and how that it is to be done.

With respect to the State Attorney General's motion to intervene or a motion to join the AOC as a party, we noticed that there were basically three points of authority cited. One involved Tennessee Rule of Civil Procedure 19.01. The second involved Tennessee Rule of Procedure 24.01.

We think the beginning point of that discussion is that you start with the scope of the rules, Rule 1, and the scope of the rules, Rule 1 says these rules shall not apply in General Sessions Court except in three instances, and none of those three instances is apposite to the hearing that we have here today. We do acknowledge, however, that the State Attorney General has an interest,

under the statutory duties described in Title A, to be involved in matters that affect the State, but we do not view this--and I've said this before informally, and we all have, that we do not view this as a trial or an adversary proceeding. We view this as a proceeding held pursuant to Rule 13. We certainly will consider the State's opinion if they have one - I think they do and want to express it - as to the scope and nature of any relief the Public Defender may receive if they're able to carry their burden of clear and convincing proof that relief is required under the rule.

The order of proof, as we think it should go forward today, is to allow the statement on behalf of the Public Defender to open, have a presentation of witnesses in support of your motion. There may be questions asked by various judges on this panel, obviously, since they have to make that decision, and then hear from the State Attorney General.

And you're not calling any witnesses?

MR. DIMOND: No. I just have legal argument. What capacity do you plan to hear from the State Attorney General; as a party, or as simply--or are you just going to hear from us, because we filed a motion to dismiss based essentially on legal grounds, Your Honor. So I just am not sure--this is an unprecedented hearing. I--

JUDGE EMERY: Oh, yes. It's not totally